No. 10946.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the Estate of Nat Rogan, Collector of Internal Revenue for the Sixth District of California, Deceased,

Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last Will and Testament of Peter Ferry, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

REPLY BRIEF FOR APPELLEE.

The facts and the opinion are set out in the Record, to which the attention of this Honorable Court is respectfully directed.

Opinion Below.

No formal opinion was handed down by the District Court in this case. The Findings of Fact and Conclusions of Law were filed by the Court. [Record, pp. 45 to 67.]

No question of jurisdiction is involved.

QUESTION PRESENTED:

Whether the grounds upon which the judgment was based were presented in a Claim for Refund or in any amendment to the claim or were considered by the Commissioner in acting upon the claim or any amendment, or were before the Commissioner in acting upon the claim or any amendment, or whether the defects, if any, in the claim were waived?

Appellee respectfully submits that: She has fully and completely complied with the law, statutes, and regulations involved in this case.

I.

The Appellant Contends That the Appellee, Taxpayer, Did Not Comply With Section 3772, 26 U. S. C., 1934 Edition, and With the Treasury Regulations 80, 1934 Edition, Article 99. This Claim Is Unfounded.

Section 3772 provides that (a) there must be a Claim for Refund filed with the Commissioner of Internal Revenue and (b) that the Claim for Refund should conform to the regulations established by the Secretary of the Treasury.

The appellee, taxpayer, did file a Claim for Refund. [Record, p. 502 *et seq.*]

The Regulations say that the Claim for Refund must be made on Form 843. That was done. [Record, p. 502, Exhibit E, first two words.]

The Regulations say that the Claim for Refund must ". . . set forth in detail and under oath each ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof . . ."

(Treasury Regulations 80, 1934 Edition, Article 99. Quoted in Brief for the Appellant, pp. 3 and 4.)

The Claim for Refund conforms exactly to the Regulations. It presents all the facts that are pertinent to the issues in this case and all the claims that have been discussed and adjudicated in all the proceedings up to this point. [See Record, p. 502 *et seq.*, and a detailed analysis in II below.]

II.

The Claim for Refund Presented Three Points to the Commissioner of Internal Revenue.

1. The first point was that only one-half of the corpora of the trusts, with which this action is concerned, should have been included in the deceased husband's estate for Federal estate tax purposes, because

> (a) There was an agreement made between the spouses as of 1905 that all of the property which either or both of the spouses acquired thereafter would be vested in them jointly, and each was to have ownership of a vested, undivided one-half interest. This agreement was confirmed by a long continued course of conduct extending up to the day of the death of the husband; and
>
> (b) Each spouse put the one-half interest which that spouse owned into the corpora of the designated trusts; and
>
> (c) The interest of each spouse was the interest which a joint-tenant always has. [Record, pp. 505-508.]

Form 706, the Federal Estate Tax Return, presented the same facts which were put into the Claim for Refund. [See Schedule E-1; Record, p. 562, at pp. 605 to 609.]

The Protest embodied the same claims which were presented in the Claim for Refund and the same facts which were set out in Form 706. [See Record, p. 953 at 954, fourth paragraph; Defendant's Exhibit F.]

The Complaint of the appellee, taxpayer, presents the same grounds for refund that the Claim for Refund presented. [Record, p. 2 at pp. 6, 7 and 8, first full paragraph.]

The Amended Answer of the Government specifically denied the allegations in the Complaint. [See Record, p. 12, at pp. 13 and 14.]

The Pre-Trial Brief of the Collector of Internal Revenue presented arguments on precisely the same claims which the Appellee-Taxpayer had put into her Claim for Refund and presented no other grounds. See Plaintiff's Exhibit No. 65, where "the ultimate questions" as phrased by government counsel are presented. [Record, pp. 835 and 841.]

The District Court made Findings of Fact which established factually the exact claims which the appellee had made in her Claim for Refund. [Record, pp. 53 to 56; Findings of Fact Nos. XX to XXX, inclusive.]

The District Court also decided the same questions of law which Appellee had presented in her Claim for Refund and which had been embodied in the Protest and which had been copied by the government in the Pre-Trial Brief, and decided them in favor of Appellee-Taxpayer. [Record, pp. 63 to 65; Conclusions of Law Nos. VIII to XIII, inclusive.]

2. The second point presented in the Claim for Refund was that one-half of the proceeds from the Insurance

Policies taken out on the life of the decedent husband belonged to the surviving wife, because all the premiums were paid out of funds which belonged equally to both spouses, so that one-half the proceeds belonged to the Appellee-Taxpayer and should not be taxed to the estate of the decedent husband. [Record, p. 502 at 508, first full paragraph.

The Complaint of the appellee, taxpayer, clearly sets out the same facts and the issues relating to the insurance policies. [Record, p. 2 at p. 8, paragraph X.]

The Amended Answer by the government expressly deals with the Insurance Policies and avers that the appellant defendant was without truth or information sufficient to form a belief as to the truth of the averment that the wife had any interest in the insurance policies.

Thus, the facts concerning the Insurance Policies and the legal questions involved were clearly raised by the pleadings.

Form 706, the Federal Estate Tax Return, presented the same claim and the same facts upon which the Claim for Refund was based. [See Schedule C-2; Record, pp. 585-592.]

The Protest embodied the same claims which were included in the Claim for Refund and the same facts which were set out in Form 706. [Record, p. 954, "Second"; 955, 957, second full paragraph, last paragraph.]

The Pre-Trial Brief of the Collector of Internal Revenue presents and argues the same facts and questions of law which the appellee, taxpayer, sets out in her Claim for Refund. [Record, p. 835, at pp. 839 to 841.]

The District Court made Findings of Fact which established factually the precise claims which the appellee, taxpayer, had presented in her Claim for Refund. [Record, p. 45, at pp. 57 to 58; Findings of Fact Nos. XXXIII to XXXVI, inclusive.]

The District Court also decided the same questions of law which had been presented by appellee, taxpayer, in her Claim for Refund and which had been argued by Government Counsel in their Pre-Trial Brief. [Record, pp. 62-63; Conclusions of Law, Nos. 1 to IV, inclusive.]

3. The third point presented in the Claim for Refund was that the case of *U. S. v. Goodyear,* 99 F. (2d) 523 and *Lang v. Commissioner,* 304 U. S. 264, and the provisions of the California Civil Code, sections 158, 1619, 1621, 2280, were controlling in this case. [Record, pp. 506-507.]

Form 706 does not require any statement of the legal support for the data given in that form.

The Protest adds the case of *Hill v. Commissioner,* 24 B. T. A. 1144, to the cases adduced in the Claim for Refund.

The Pre-Trial Brief of the Collector of Internal Revenue discussed the *Lang* case [Record, pp. 840-841] and the *Goodrich* case, but ignored the provisions of the California Civil Code, and the *Hill* case.

The District Court made Findings of Fact which established factually that the Commissioner of Internal Revenue knew and considered all the claims made by the appellee, taxpayer, in her Claim for Refund, that the Pre-Trial Brief of the government contained the same material upon which the Claim for Refund was made, and that the Com-

missioner of Internal Revenue had not been ". . . at any time or in anywise or manner deceived, misled, or imposed upon by the trial of and the decision upon each and all of said grounds relied upon by the plaintiff . . ." [Record, p. 61, Findings of Facts, Nos. XXXVI, XXXVII, XXXVIII.]

The attention of this Honorable Court is respectfully called to the apposite language of Mr. Justice Stone (now Mr. Chief Justice Stone) in the case of *Tucker v. Alexander,* 275 U. S. 228 at 231, which says:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

The District Court reached Conclusions of Law and gave judgment for appellee, taxpayer, on the precise legal questions which were presented by the appellee, taxpayer, in her Claim for Refund. [Record, pp. 62 to 67, incl.]

Hence, the Record, as it comes before this Court, completely disproves the contention of the appellant that the decision of the Instant Court was based on the facts and claims which had been presented by the appellee, taxpayer, to the Commissioner of Internal Revenue in her Claim for Refund.

The Record establishes that the appellee-taxpayer, had fully conformed to Treasury Regulations No. 80 (1934 Edition) and to the provision of 26 U. S. C. 1940 Edition, Section 3772, which governs the Claim for Refund made by the appellee, taxpayer.

III.

It Is Respectfully Submitted That the Cases Cited by the Government Are Not at All in Point as to the Question Which Is Involved in This Appeal.

In the case of *Goodrich Company v. United States,* 135 Fed. (2d) 456, affirmed on other grounds 321 U. S. 125, the ground given in the claim for refund was that the right to a refund came as the result of an assignment from the former owner of the property which was subject to taxation, while the complaint alleged that the right to a refund came to the taxpayer because of the operation of law. The language quoted from this case by appellant was not considered, accepted, nor affirmed by the United States Supreme Court. (See *Goodrich v. United States,* 321 U. S. 126 at 127.)

In *United States v. Felt & Farrant Company,* 283 U. S. 269, the claim for refund gave as its sole ground for a refund that the taxpayer was entitled to special relief under section 210 of the Act of 1917, but the complaint

in the suit which was filed asserted a right to a refund because of a right to deductions which were based on the exhaustion and obsolescence of patterns.

In *Maryland Casualty Company v. United States,* 251 U. S. 342, the claimant, taxpayer, failed completely to follow the requirements of the statute.

In *United States v. Memphis Cotton Oil Company,* 288 U. S. 62, no grounds whatever were stated in the taxpayer's claim for refund.

In *Angelus Milling Co. v. Commissioner,* 325 U. S. 293, Rehearing denied June 18, 1945, the form which was required by the Regulations was not followed at all.

The case of *Tucker v. Alexander,* 275 U. S. 28, is not at all in point for the argument made by the government. We have quoted above the salient and most pertinent language in the case. The attention of this Court is respectfully directed once more to that language.

It is respectfully submitted that the cases cited by the Government can not be used as precedents in any sense in the instant case, where the grounds set out in the Claim for Refund and the grounds alleged in the Complaint in the District Court were exactly alike.

It would unnecessarily extend and cumber this brief to analyze those cases in detail.

There was no possibility that the Commissioner of Internal Revenue was not apprised of the facts and the claims which the appellee, taxpayer, had made and was making in this case.

IV.

Copies of All Five Trusts Were Submitted at the Time Form 706 Was Filed. Attached to All These Trusts Are Complete Lists of the Corpora of the Trusts, Stating in Detail the Contents.

However, on April 12, 1943, a Stipulation was entered into between E. H. Mitchell, Esq., for counsel for defendant, and Claude I. Parker, Ralph W. Smith and John Moore Robinson, Counsel for plaintiff. On pages 476 to 482, both inclusive [Vol. II, Exhibits] appear a detailed list of parcels of real property, wherein it was expressly stipulated as a fact that 24 parcels of real property were held by Peter Ferry and Catherine B. Ferry as joint tenants with right of survivorship, by deeds executed before the properties were placed in trust, and one parcel held as tenants in common.

We must digress and call the court's attention to the discussion of the California Supreme Court in the case of *Siberell v. Siberell* (1932), 214 Cal. 767, at 773, where the Court said:

> "The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character, and following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors and other complications

> which would defeat *the right of survivorship, the chief incident of the law of joint tenancy.* A joint tenancy is one estate and in it the rights of the spouses are identical and co-extensive." (Emphasis supplied.)

The importance of this stipulation with respect to the title to the real property before it was placed in trust cannot be minimized, because it destroys the government's contention that title to this real property should have been ignored by the court.

The traditional solemnity of stipulations between counsel and their binding effect have received such well established recognition that discussion of the effect of these stipulations should be superfluous.

However, the appellant's brief discloses obliviousness to this stipulation and it is therefore important to call this Court's attention to the binding effect of these stipulations, and quotations are hereby made as follows:

Oscanyan v. Winchester Arms Co., 103 U. S. 261 at p. 263, 26 L. Ed. 539:

> "In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof; and if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." (See, also, 60 C. J., 57; 7 C. J. S., 921.)

It is further true that in the government's Pre-Trial Brief the government anticipated that the existence of the legal title as disclosed by the Stipulation would present contentions with which they disagreed.

All this is stated in rebuttal of the government's insistence that issues have been presented at the trial which it could not anticipate.

There is also confusion on the part of the government with respect to issues of law. The fact that the claim for refund and the various documents, protests, and stipulations of the taxpayer all contain facts from which different legal inferences can be drawn, imposes no duty upon the taxpayer to argue all questions of law in advance of the trial. It would be a strange theory that because the trial of the case unfolded new questions of law, that there has been an unfair advantage. This is particularly novel in a tax proceeding involving questions of law currently affected by a wealth of discussion in the Tax Courts, the Federal, District, and Circuit Courts, and in the United States Supreme Court, many conflicting and unsettled, particularly during the period following this controversy. It would be indeed an exceedingly exaggerated compliment to assume that counsel for a taxpayer must be prepared to argue every question of law involving a tax refund before the controversy comes to trial.

In this respect reference is hereby made to the case of *Wunderle v. McCaughn,* 38 Fed. Rep. (2d) 258 at 260:

> "I am of the opinion that where, as in this case, the deduction of a specific item of credit claimed but subsequently disallowed by the Commissioner is the basis of the claim, a claim for refund, setting forth fully and in detail all the facts and circumstances giving

rise to the claim, is a sufficient compliance with the statute, and further, that the fact that an erroneous legal theory is presented, or, more specifically, that the deduction is claimed as a bad debt when it is really something else, does not destroy the legal sufficiency of the claim for refund. The requirement of the statute (26 USCA §156) is 'a claim for refund or credit . . . according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof . . .' The regulations in force require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath.' In Tucker v. Alexander, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, the Supreme Court said: 'The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.' "

In the case at bar, appellee's grounds for recovery in the claim for refund and in the complaint are identical, *i. e.,* in each document Mrs. Ferry contended that she was the owner of one-half of the property. The ultimate facts supporting said grounds are clearly set forth. At the most, it could be argued that the appellee failed to insert in her claim all of the evidentiary facts.

It is respectfully submitted, and examination of the voluminous records in this matter will show, that it was not the intention of Congress to compel a taxpayer to set forth in a claim for refund all the evidentiary matters.

Another important decision is the case of *U. S. v. Memphis Cotton Oil Co.,* 77 Law Ed. 613, where Judge Car-

doza gave careful consideration to questions of refund claims and said:

> "The claim for refund filed with the Commissioner in June, 1927, was not subject to rejection on the score of the time of its submission. As to this the parties are agreed. Indefinite and general it was, and hence, until amended or supplemented, an inadequate compliance with the Treasury requirement that the facts relied upon in support of a claim are to be stated under oath. Beyond doubt it might have been rejected as irregular while its form was uncorrected. This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter."

This Court can not assume that a widow, filing a claim for refund, will conceal a valid ground for refund and thereby incur the expense of litigation. This was well stated in the case of *Union & New Haven Trust Co. v. Eaton,* 20 Fed. (2d) 419, page 421:

> "But it is urged that the specified ground for a refund of this amount was not urged in the plaintiff's claim for refund, and that the plaintiff is therefore precluded from setting up this ground in this action. I am unable to draw any such conclusion from a study of the statute. Obviously, the statute requires nothing more than that a claim for refund be duly filed with the Commissioner of Internal Revenue. In order to induce favorable action, a claimant will assign as many grounds for such refund as he is cognizant of. It is not to be expected that a claimant will conceal a valid ground for a refund merely in order to obtain an opportunity of incurring the expenses of litigation. It is to be observed that, whether claimant assigned grounds or not, the statute merely requires that he file his claim for refund. To hold,

> therefore, that a plaintiff is precluded from asserting a reason for a refund that he has not advanced in his notice of claim is to read a condition into the statute not legislated by Congress. To assert that Congress has the power to impose any condition that it sees fit to the grant of a right to sue the sovereign is true enough, but also irrelevant. The question here is: What is the condition that Congress has actually imposed?"

A substantial portion of the recovery given appellee in the judgment in this matter was based upon the exclusion from the gross estate of a portion of the life insurance upon the life of the decedent upon the ground contained in the amendment to the claim for refund. This amendment to the claim for refund was filed with the Commissioner in the form of a protest. [Vol. III, p. 953.]

The evidence adduced in the trial of the cause supports the judgment of the Court in this matter. The evidence shows that Mrs. Ferry's share of the income from the trusts, which naturally was her separate property, was deposited in joint bank accounts. [Vol. I, Tr. of Record, pp. 190, 192, 193, 194, 195, 431, 432, and 435.] The evidence further shows that all the premiums of all of said policies of insurance were paid for on checks drawn on said bank accounts. [Tr. of Record, pp. 434, 435, 799-822, both incl.]

On page 24 of appellant's brief, counsel states:

> "It is also significant that appellee made no claim in the return, claim for refund, protests, or otherwise, that she was entitled to one-half of the stocks, bonds, cash, or other property standing in the name of the decedent."

This appears to interject a collateral issue into this controversy. Criticism of a taxpayer in a proceeding of this nature because she is not ruthless and does not demand every last cent that is refundable is very severe, when there was in fact no net estate. However, we think further examination of the facts will show that the probate estate received consideration by the government and counsel for the taxpayer. Attention should here be called to page 827, Vol. III, Book of Exhibits, where the following statement appears:

> "Deductions.....Total $14,126.18 $9,909.60
> Recommended allowable only to the extent of the value of the gross estate Probated."

In other words, no issue arises with reference to these assets because they have been absorbed by allowable deductions.

When Catherine B. Ferry, the widow, filed the required verified federal estate tax return, she incorporated therein her sworn statement in the following words:

> "That it was necessary, and affiant, Catherine B. Ferry, did join in the creating of these trusts, hereinbefore set forth and in so creating these instruments received only that which was already her property pursuant to the laws of the State of California." [Vol. II, Exhibits, p. 609.]

Such language does not mean "the laws with regard to community property." It is, therefore, appropriate to quote section 161 of the Civil Code of California, which says:

> "A husband and wife may hold property as joint tenants, tenants in common or as community property."

Furthermore, in the case of *Harlow v. Standard Improvement Co.,* 145 Cal. 477 at 480, the Supreme Court of the State of California said:

> "Under Section 161 of the Civil Code the husband and wife may hold property as joint tenants, tenants in common or as community property; and in the absence of any evidence of the source of the moneys with which the house was built, or of the manner in which the property was acquired there is no presumption that it was community property, or separate property of either spouse, rather than that it was held by them in joint tenancy, or as tenants in common."

This discussion is necessary because of the presence of a parenthetical statement on page 23 of appellant's brief.

Here the writer of appellant's brief has arbitrarily added to Mrs. Ferry's previously quoted statement the following language: "(Meaning, of course, the laws with regard to community property,)".

Mrs. Ferry and her counsel should be the best judges of what they intended the language in the estate tax return to mean. But if it is contended that this language means solely community property, then a reexamination of the previous citations will dispel any such misconception.

These citations are hereby given because it is apparent that the government is taking an entirely too narrow viewpoint with respect to the title to property involved in this estate. It is ignoring a principle consistently followed by the Treasury Department in dealing with questions of this nature and which have been stated with precision by

Mr. Justice Frankfurter in *Helvering v. Hallock,* 309 U. S. 105 at 114, Vol. 84 Law Ed. 610, where he said:

> "In determining whether a taxable transfer becomes complete only at death, we look to substance, not to form."

The principles so definitely and consistently apparent in the law of taxation were adhered to by the Trial Court.

The Trial Court had before it the question as to whether or not the appellee, taxpayer, owned a half interest in the property, which is now the corpora of the several trusts involved in this case. The government claimed that the appellee, taxpayer, did not own the property in question. The Trial Court, after considering all the evidence submitted by both sides, decided that the appellee, taxpayer, did own a half interest in the property which is now held in the trusts which are of moment in this case, and made a finding of fact to that effect, in spite of the difficulties of finding an exact terminology with which to describe the existing situation.

The irrelevancy of the niceties of terminology when a half interest actually exists which may fit into various categories is recognized by the Federal Courts and finds apt expression in the case of *Valensin v. Valensin,* 28 Fed. 599 at 601, where the Court said:

> "There can be no possible doubt, upon the evidence, that the understanding and uniform practice of the parties, for several years during the entire period of their joint occupancy, was that the proceeds of the separate property of each should be regarded as common property, in which both were jointly, equally interested. The property and its proceeds were mingled with the knowledge, and apparent assent, of both. No separate account was ever kept, and no

separation of their property made. Both used it and treated it as common. Now, whether the carrying on of this business is called a technical partnership, or whether the parties, by mutual agreement and unvaried practice, during all the time they lived together on the lands, put the proceeds of the property, and of its management, into a common pool and were by mutual understanding co-owners and joint tenants, or tenants in common, can make no difference as to a recovery in this action. If not technically a partnership, it is essentially one."

And on page 602:

"That the wife is competent to enter into such arrangement with her husband, respecting his and her separate property, and the proceeds thereof, as clearly appeared to have existed in this case, seems unquestionable, under our Code. 'Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried.' Civil Code, §158; Alexander v. Bouton, 55 Cal. 19."

Due consideration must also be given to the fact that the transactions between Mr. and Mrs. Ferry had their inception many years ago and were between a husband and wife. Such arrangements were informal and lacked the precision present when strangers contract. The courts recognize the wide latitude of evidence applicable to situations of this nature. See *Perkins v. Sunset Tel. and Tel. Co.,* 155 Cal. 720, where the Court said:

"It will be seen by an examination of the authorities cited above that the utmost freedom of contract exists in California between husband and wife and that the courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence

or non-existence of a contract where the exact terms of the alleged agreement have escaped the memory of one or both of the parties to it. In the case at bar there was both positive evidence and also testimony as to facts and circumstances tending to show that the contract, whereby the husband remitted to his wife all his interest in that which would ordinarily have been community property, was, and had been in existence for a long period of years. The findings upon that subject were supported by the evidence."

V.

Relative to the Taxation of the Trusts, the Grounds Upon Which the Judgment Was Based Were Considered by the Commissioner, as Evidenced by His Admission.

The Pre-Trial Brief which was received in evidence in this matter [Record, p. 442] contains the following statement by the government as to the grounds and contentions of appellee before the Commissioner on the matter of her ownership of one-half of the properties that went into the trusts. In said Pre-Trial Brief it is stated [Record, p. 837]:

> "Before the Commissioner, plaintiff contended that for tax purposes an undivided half of the properties placed in the trusts was originally owned by her, but never presented to the Commissioner *sufficient evidence* to establish such fact. What evidence plaintiff will produce at the trial to support such factual contention is at this time unknown to the defendant." (Italics supplied.)

It is to be noted that the drafter of this Pre-Trial Brief, E. H. Mitchell, Esq., Counsel for the government, was present in Court during the entire trial of this matter,

yet no attempt was made to introduce evidence at variance with said statement in the Pre-Trial Brief or to show that said representation of fact in said Pre-Trial Brief was false and unfounded.

In acting upon a claim for refund the Commissioner is bound by the grounds he considers.

See *Union Trust Co. of Pittsburgh, et al. v. McCaughn,* 24 Fed. (2d) 459; 6 A. F. T. R. 7325.

Conclusion.

The appellee, taxpayer, therefore respectfully submits:

1. That there is no variance between the facts and the grounds which she stated in her Claim for Refund and the facts and the ground which she stated in her Complaint in the District Court;

2. The Commissioner of Internal Revenue was consistently and in various ways advised of the bases of the contentions made by the appellee, taxpayer;

3. The Judgment of the District Court was properly predicated upon the evidence presented at the trial; and

4. That the Findings of Fact, as made by the Trial Court, and the Conclusions of Law, as reached by the Trial Court, were properly made and reached.

It is, therefore, submitted that the judgment of the Trial Court in this case should be affirmed.

Respectfully submitted,

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